United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

74-1268

~~T-3134~~

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

HAROLD BIGELOW and VIRGINIA BIGELOW and COOPERATIVE FIRE INSURANCE ASSOCIATION OF VERMONT,

Plaintiffs-Appellants,

v.

AGWAY, INC. and KEMIN INDUSTRIES, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT AT CIVIL ACTION NO. 6536.

BRIEF FOR APPELLANTS AND APPENDIX

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TABLE OF CASES.

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Docket No. T-3134

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BRIEF FOR APPELLANTS

Statement of the Case

This is a Civil Action brought by Harold Bigelow and Virginia Bigelow for losses incurred by them in a fire of July 8, 1971, against Agway Inc. and Kemin Industries. The Plaintiffs' claim was based on theories of negligence and breach of warranty. (See Complaint, Appendix pg. 4a.) The Cooperative Fire Insurance Association of Vermont, Inc. was joined as a Plaintiff to the extent of their subrogation rights. Jurisdiction is based on diversity of citizenship.

The case was tried by jury on 11 December 1973, 8, 9, 10, and 14, January 1974 and resulted in a verdict being directed against the Plaintiffs. The Court disposed of the negligence claim on the ground that the Plaintiffs had not adduced sufficient evidence on the issue of proximate cause to warrant submission of the case to the jury (T576-77). The Court directed a verdict on the warranty claim both on the proximate cause ground, and on the ground that no evidence had been offered that the product "was either dangerous or defective at the time it was used." (T575). It is from this direction of the verdict that the Plaintiffs appeal.

Statement of Facts

The Plaintiffs, Harold and Virginia Bigelow in 1967 purchased a dairy farm in St. Albans, Vermont (T48-49). Mr. Bigelow who is 31 years of age has had a great deal of experience farming and in fact was named Vermont's Outstanding Young Farmer in 1972 (T52). The Bigelow farming operation had a stanchion barn where the cows were tied up in the barn and the feed was brought to them at their stanchion. The only feed grown on the farm was hay and the farm produced 18,000 to 20,000 bales, or in the range of 400 tons of hay yearly (T51).

Hay must first be cut, then raked and allowed to dry in the field before it can be baled. If hay is baled before the moisture content is reduced to a safe level by drying in the field, there are dangers not only of rot and mold but of fire by spontaneous combustion starting in the partially dried hay (T64).

The Bigelows had a fire on July 8, 1971 (T83). The cause of this fire was spontaneous combustion (T200).

The fire started in the center section of the barn where high moisture hay was stored and where a so-called hot spot had developed. The facts surrounding how this hay got into the barn, the development of the hot spot and the measures taken to deal with it are the substance of the law suit.

Stuart Newton, a salesman for the Defendant Agway, contacted Mr. Bigelow in the early spring of 1971 for the purpose of trying to interest him in a product called "Hay Savor" (T412). Hay Savor is a product manufactured by the Defendant, Kemin Industries (T207). A chemical, it is sprayed onto hay at the time of the baling of the hay by means of an attachment to the baling machine (T58).

The purpose of Hay Savor was explained to Mr. Bigelow by Stuart Newton as allowing the baling of hay at a higher moisture content (T432). This was important as it would reduce the time the hay had to lie in the field drying out, where it is at the mercy of the weather (T433). (Plaintiffs' Exhibit #9). This would also tend to increase the nutritional value of the hay by reducing the amount of loss of leaf matter in the drying process.

Thomas Nelson, Kemin Industries sales representative, and a brother to the President of that company, said that one of the "important sales claims" was to allow the farmer to put up "high moisture hay" (T222). Another was to "lower the incidence of heating in hay by means of retarding mold" (T217). These positions were set forth in a booklet (Plaintiffs' Exhibit #4) given to the Plaintiff by Agway, which the Plaintiff read (T54). This booklet failed to contain test data, available to Agway, that tended to show that Hay Savor did not reduce the heating in hay with higher than normal moisture levels (Plaintiffs' Exhibit #8). It did contain charts tending to show that Hay Savor reduced heating in high moisture hay.

Based on the sales claims of Mr. Newton and the Agway literature, Mr. Bigelow purchased some Hay Savor and related equipment. The equipment was properly installed and calibrated (T61, T256).

Unknown to Mr. Bigelow, Vermont was a test marketing area (T225) for the product and on either the 15th or the 16th of June, Stuart Newton brought Thomas Nelson on behalf of Agway to the Bigelow Farm (T243).

Among other reasons for going to the Bigelow farm, Nelson wanted pictures in connection with the test marketing program for promotional purposes (T260). At the farm Nelson and Newton went out into the fields with Harold Bigelow. Nelson was carrying with him moisture testers (T260) (T417) and in fact made several tests on the cut and raked hay (T62, T261, T417). The moisture tester showed high readings in the hay tested (T64).

Despite the high readings and comments by the Plaintiff that he thought the hay was too green to bale safely, Nelson told the Plaintiff, Harold Bigelow, that with Hay Savor on it it was okay to bale (T63, T263). Mr. Bigelow did bale the hay that day against his better judgment relying on these representations of Nelson (T64).

At the time they were put into the barn the fact that the bales were heavier than usual was called to the attention of Nelson. He indicated that with more moisture content they would be heavier and that there would be no problems with them going in the barn (T68). This hay was put into the center section of the barn (T65, T69) (Plaintiffs' Exhibit #3). It was in this hay that the heating problem was discovered (T71).

When the heating problem was first discovered on June 19, Nelson came to the farm with the county agent (T74).

A probe was used to take the temperature of the hot spot, a localized area of extreme heating, and temperatures of close to 190° were recorded (T74). At 160° there is considerable danger of the barn "blowing" (T200). "Blowing" is caused by oxygen getting into the hot spot supplying the third ingredient to the fuel and heat already there, causing a rapidly expanding fire compared to dynamite (T457) or a can of gasoline (T541).

Upon discovering the seriousness of the situation, Agway called Kemin Industries and Nelson returned to Vermont (T305). Over the next two weeks and more, Agway and Kemin indicated extreme concern over the situation as the hot spot area involved hay treated with Hay Savor (T305) (Plaintiffs' Exhibit #13).

Agway contacted a Professor Tessman from the University of Vermont and for the only time in his 18 years of making recommendations on behalf of the University in hot hay situations, he went to the Bigelow farm (T453). Agway had Tessman make a special probe so that CO_2 could be fired into the hot spot (T454). This was the first time Tessman had ever dealt with this process (T458) of which the purpose was both to cool the area and to exclude oxygen (T458). Agway supplied eight 50 pound tanks of CO_2 plus manpower to try and cool off the hot spot (T378-385). Agway supplied a water truck (T392) and finally made arrangements for the fire department to stand by on July 8th at 8:00 when these employees along with Harold Bigelow were going to try and make an attempt to get the hay out of the barn (T313). The barn burned on July 8th about 4 to 6 hours before this operation was to begin.

Issues Presented

1. Did the Plaintiffs produce sufficient evidence on the issue of proximate cause to warrant submission of the case to the jury?

2. Did the Court err in directing a verdict on the Plaintiffs' breach of warranty claims?

ARGUMENT

I. The Plaintiffs produced sufficient evidence on the issue of proximate cause to warrant submission of the case to the jury.

Negligence is the failure to exercise care which the circumstances reasonably require or justly demand. *Thurber vs. Russ Smith, Inc.*, 128 Vt. 216, 219 (1969). The duty of care increases proportionately with the foreseeable risks of the operation involved. *Forcier vs. Grand Union Stores, Inc.*, 128 Vt. 389, 394 (1970).

Negligence, of course, is not actionable unless it is a proximate cause of the injury. *Cameron vs. Bissonnette*, 103 Vt. 93 (1930); *Humphrey vs. Twin State Gas & Electric Company*, 100 Vt. 414 (1928). While foresight of harm is fundamental to a finding of negligence, *Forcier vs. Grand Union Stores, Inc.*, 128 Vt. 389, 393 (1970); *Thompson vs. Green Mountain Power*, 120 Vt. 478, 483 (1958), proximate cause relates only to cause-in-fact, with no foreseeability required. *Dodge vs. McArthur*, 126 Vt. 81, 83 (1966).

On the issue of negligence, the Court recognized that the Plaintiffs presented sufficient evidence to warrant a jury determination of that issue. In directing the verdict, the Court indicated that the assurances made by Mr. Nelson of

Kemin Industries to Mr. Bigelow, by which Nelson assured Bigelow that he could safely bale green hay after applying Hay Savor, could constitute negligence (T576).

It was on the question of proximate cause that the Court directed the verdict (T576-77). The Court believed that a failure of proof had occurred on two points. The Court stated:

(1) "There is no evidence that the hay that was baled on June 15 developed hot spots or . . . was the source of the fire which occurred on July 8."

and (2)

"There is no evidence that the Plaintiff Harold Bigelow relied on the statement by Mr. Nelson in baling hay that had a high moisture content. . . ."

The Court said:

"If Kemins Industries negligently misrepresented that there was no need to worry about moisture in baling with Hay Savor, there is no evidence that such statement was relied upon by the Plaintiff and became the legal cause of the destruction of the barn."

In this Circuit the test as to whether a verdict should be directed has been stated in this fashion:

"Simply stated, it is whether the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable men could have reached." *Simblest vs. Maynard*, 427 F.2d 1, 4 (2d Cir. 1970).

The evidence must be viewed most favorably to the party against whom the motion is made, *Galloway vs. U.S.*, 319 U.S. 372 (1943); *Berner vs. Bristol Commonwealth Pacific Airline, Ltd.*, 346 F.2d 532, 538 (2d Cir. 1965), and that

party must be given the benefit of all reasonable inferences from the evidence. *Simblest vs. Maynard,* 427 F.2d 1 (2d Cir. 1970). The Court may look only to the evidence favorable to the non-moving party and to unfavorable evidence that is uncontradicted and unimpeached. *Simblest vs. Maynard,* 487 F.2d 1, 5 (2d Cir. 1970); See Wright and Miller, Federal Practice and Procedure § 2529.

An examination of the evidence favorable to the Bigelows and the evidence unfavorable and uncontradicted indicates that the Bigelows produced sufficient evidence on the issue of proximate cause to require submission of the case to the jury on the negligence claim. First, the Court overlooked substantial evidence in ruling that the Plaintiffs had produced no evidence that they had relied on assurances of the Defendants in placing moist hay in storage. Second, it was the Bigelows' contention that the fire resulted from spontaneous combustion caused by the storage of moist hay, and that the only moist hay stored by Mr. Bigelow had been treated with Hay Savor in reliance on the Defendants' assurances of safety. The Court appears to have misunderstood this point in ruling that the Plaintiffs had produced no evidence that the hay baled on the 15th of June developed hot spots, but the point emerges with sufficient clarity from the evidence to demand submisson of the case to the jury.

A. Evidence of Reliance

Mr. Bigelow testified that he altered his prior practice of baling only dry hay and began baling green, high moisture hay only upon receiving Mr. Nelson's assurances on June 16 that using Hay Savor, it would be all right to bail the green hay (T63-64). The following excerpt is Mr. Bigelow's recollection of his June 16 conversation with Mr. Nelson:

Q. Well, let's start with describing what a wind row is, what you had done to get a wind row?

A. Well, this, I have a self-propelled Heston and after it, most of the hay is put in a wind row then we just go along after the top dries, we go along with the brake and just roll it over and then we always let it dry but that particular day when he let it ride with the moisture meter, he said it was ready for baling. Bale it up, put it in the barn, don't worry about it.

Q. Do you remember any observations you made about the hay?

A. I said it was too green and he said with the Hay Savor on it, it was all right.

Q. Did you in fact, follow his instructions?

A. Yes, I did.

Q. Do you remember, you said he used it, as a special instrument of some sort, a moisture tester?

A. Yes, he had a moisture tester.

Q. Could you tell us what a moisture tester looks like?

A. About the size of a little pocket radio with a meter on it, just put it over the top of the hay and it reads on this, tells the moisture content of the hay.

Q. Do you remember, did you see yourself, the reading, at all?

A. Yes, I have.

Q. And what was the reading that day in your eye?

A. 32, 34.

Q. Was Mr. Newton there at that time?

A. Yes, he was.

Q. Was he aware of the readings?

A. Yes, he was.

Q. This is the same Stuart Newton from Agway?

A. Yes.

Q. Now you, yourself, over the years I take it, you have baled a lot of hay?

A. Yes, I have.

Q. Have you ever baled that hay the way it was that day?

A. No, I wouldn't have.

Q. Why wouldn't you have?

A. It was too green.

Q. And what's the problem of baling green hay?

A. It either all molds, rots, or, you will have a fire.
Q. The, but, you did do it that day?
A. Yes.
Q. Right. That was after your conversations with Mr. Nelson?
A. Yes.

The conversation referred to by Mr. Bigelow was recalled clearly by Mr. Nelson (T263):

Q. And do you remember what you told him?
A. About what?
Q. About baling hay that day?
A. What?
Q. Of baling hay that day?
A. Yah, well, yes, sir, and no, I guess I told him that hay looked all right, it if was turned, to me.
Q. Did you tell him anything to the effect that with Hay Savor, using that, that that hay ought to be okay?
A. Yes, those are practically my exact words.

Later Mr. Bigelow again testified that prior to the date on which he received the assurances of safety from Mr. Nelson, he had baled and stored only dry hay, as was his normal practice. Only after conversations with Mr. Nelson did Mr. Bigelow bale and begin storing green hay. (T155-156)

Q. I'm talking about before Mr. Nelson came, what was the condition of the hay when you had baled it?
A. That day it was dry like it was, like I always baled it.
Q. And the, when was it that you started to bale hay differently than you ordinarily do?
A. On the 16th.
Q. And that was on, after conversations with Mr. Nelson?
A. Yes.

It is apparent from the record that the difference mentioned here refers to the fact that on the 16th, Mr. Bigelow began baling green, high moisture hay. The plain infer-

ence here is that Mr. Bigelow did so in reliance on his conversation with Mr. Nelson (T263) which included the assurances of safety alluded to in the Court's order.

In addition to the direct evidence above, considerable circumstantial evidence was produced which tends to indicate the reliance. First, Mr. Bigelow never baled green hay until he began using Hay Savor (T64; T71). Second, Mr. Bigelow was Vermont's outstanding young farmer of 1972, and it is a basic farming practice to bale and store only dry hay (See Nelson's Testimony, T248). Third, prior to baling the green hay, Mr. Bigelow read a pamphlet supplied by Kemin Industries (T54) (Plaintiffs' Exhibit #4), which encourages farmers using Hay Savor to bale and store high moisture hay, and Mr. Bigelow heard the representations made by Mr. Nelson that such hay could safely be stored, (T63-64; 155-56). Mr. Bigelow altered his practice of drying hay before storing it at the time of Mr. Nelson's visit, after hearing his representations. The plain inference from these circumstances is that Mr. Bigelow altered his practice of storing only dry hay in reliance on the representations of the Defendants.

B. Evidence as to the Cause of the Fire

The cause of the fire was spontaneous combustion. (T199-200; 480).

The storage of hay having a high moisture content can result in spontaneous combustion. Heat is produced when moist hay is placed in a confined area (Nelson, T263-264; T487; T64). According to the consulting engineer Andrew Tessman, hay should not be stored until moisture levels decrease to about 20% (T494). At moisture levels over 20% the danger of spontaneous combustion is present, and the higher the moisture content, the greater the danger

(T495). When stored hay reaches a temperature of 160°, it is in danger of igniting from spontaneous combustion (T200).

The hot spot which led to the fire developed among the bales which had been treated with Hay Savor. All the treated hay was stored together in the center part of Mr. Bigelow's barn (T69; T65; T138). The untreated hay was stored separately in Mr. Bigelow's two other hay barns (T69). The hot spot developed in the hay barn which contained the treated hay (T71-72). At the time the hot spot was discovered, that hay barn contained about 3000 bales. (Mr. Bigelow, T72).

The evidence offered by the Plaintiff indicates that the bulk of the treated hay was moist when stored. A principal reason for using Hay Savor was to allow the storage of moist hay (T222). Samples of the hay stored on the 15th or 16th, the day of Mr. Nelson's visit, were measured to have a moisture content of 32% (T263-264), which Mr. Tessman's testimony indicates would be sufficient to cause spontaneous combustion. The quantity of hay baled on that date was approximately 1200 to 1400 bales. Those bales appeared to the Plaintiff to be "on the heavy side". (T68). Mr. Nelson told him that that was because of the increased moisture content (T68). Mr. Nelson himself testified that a moisture content of 32% would be in excess of the moisture level acceptable with the use of Hay Savor (T264). The treated hay which Mr. Bigelow baled was green in color (T71). Bales of treated hay weighed 5 to 8 pounds more than similarly sized bales of hay which had been properly dried (T71).

No hot spot developed among the separately stored (T69) dry hay. That hay was not baled and stored until it was brownish in color (T71). While temperatures of 184° to

214° were recorded by the Plaintiff among the treated bales (T158-160), the temperature of the untreated bales of hay was measured by the Plaintiff at approximately 100° (T161).

In his years of farming, the Plaintiff had never before stored hay which developed a hot spot (T72). Never before had the Plaintiff stored hay as moist as the hay in which the hot spot developed (T64; T71).

To summarize the Plaintiffs' evidence on causation, the fire occurred in a storage area containing exclusively bales which had been treated with Hay Savor. In large part these bales consisted of moist hay. Moist hay when stored can cause spontaneous combustion. At least some of the hay stored in this area had a moisture content sufficient to cause spontaneous combustion. The dry hay which the Plaintiff baled and stored in 1971 and in prior years did not spontaneously ignite, while the wet hay did. The clear inference here is that the efficient cause of the fire was the spontaneous combustion of moist hay.

In summary, the evidence recited above provides an adequate basis for a finding that Mr. Bigelow's barn fire was caused by his storage of moist hay in reliance on the negligent assurances of the Defendants' representative, Mr. Nelson. On some points the Defendants offered contradictory evidence. In cross examination the Defendants sought to raise questions about the accuracy of Mr. Bigelow's memory of the events preceding the fire. But in ruling on a Defendant's motion for a directed verdict, the Court is confined to an examination of evidence favorable to the Plaintiff, plus any unfavorable evidence which is uncontradicted or unimpeached. It is the jury's function, not the Court's function, to weigh the evidence and the credibility of witnesses. If the jury believed the evidence

recited above, it could reasonably have returned a verdict for the Plaintiff. The Court therefore erred in directing a verdict against the Plaintiffs, who are entitled to a new trial.

II. The Court erred in directing a verdict on the warranty claim.

The Court stated that it was necessary to direct a verdict on the warranty claims because, in addition to failing to offer sufficient evidence on the issue of probable cause, the Plaintiffs offered no evidence that Hay Savor "was either dangerous or defective at the time it was used." (T575). In fact, as indicated above, the Plaintiffs offered ample evidence that Hay Savor was represented to them by the Defendants as being a product which would allow the safe baling of moist hay; that they relied on these representations; and that the moist, treated hay, when stored, did not remain in a safe condition but rather burst into flames. The Court ruling did not reach the question whether the Plaintiffs' evidence warranted submission of the case to the jury under the Vermont laws of warranty.

The Vermont law of warranty is statutory, consisting of the warranty provisions of the Uniform Commercial Code. Applicable to the evidence presented at trial are: 9A V.S.A. § 2-313[1] and 9 A V.S.A. § 2-315.[2]

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[1] § 2-313. Express warranties by affirmation, promise, description, sample

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(Footnotes continued on following page)

A buyer injured by a breach of warranty is entitled to all consequential damages proximately caused by the breach. 9A V.S.A. § 2-715. Privity of contract is not a prerequisite for such a recovery. *DiGregorio v. Champlain Valley Fruit Co.*, 127 Vt. 562 (1969).

To recover under § 2-313 the Plaintiff must show (a) a seller's affirmation of fact, promise, or description; (b) which becomes part of the basis of the bargain; and (c) non-conformity of the goods to the affirmation, promise or description. The Court did not rule as to the failure or success of proof of the Plaintiff on any of these elements.

To recover under § 2-315, the Plaintiff must demonstrate only that at the time of contracting the seller had reason to know (a) any particular purpose for which the buyer required the goods; and (b) that the buyer was relying on the seller's skill or judgment to furnish suitable goods. The Court made no ruling as to whether the Plaintiff offered sufficient evidence to reach the jury under this statute.

If the Plaintiffs produced sufficient evidence on the issue of proximate cause to reach the jury on their negligence claim, then they satisfied that element of their warranty claims as well. It is the Plaintiffs' position that they pro-

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(Footnotes continued from preceding page)

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

[2] § 2-315. Implied warranty: fitness for particular purpose

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

duced sufficient evidence as well on the statutory elements on their warranty claims to reach the jury. The Court's ruling did not address these elements.

If the Plaintiffs presented sufficient evidence to reach the jury on the issue of proximate cause on their negligence claim, it will be necessary for this Court to order a new trial on that claim. Such a trial should include the Plaintiffs warranty claims as well against both Defendants, as the Court's ruling did not determine the status of these claims.

Conclusion

In conclusion the Second Circuit Court of Appeals should reverse the decision of the trial court and order that the Plaintiffs be granted a new trial on their negligence and breach of warranty claims.

Respectfully submitted,

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APPENDIX

The Court: Members of the Jury it is always preferrable that a case that has been heard by a Jury be decided by the jurors that have listened to all the evidence. Sometimes it happens, however, the evidence that is presented during the course of a trial fails to establish legal liability. In that event, the Court must deal with the total effort as a matter of law and act accordingly.

In this case, the Court has, during the recess, since we were last here, the Court has gone over in great detail all of the evidence that was presented in the case and the Court has come to the reluctant conclusion that there is no evidence or insufficient evidence in this case, upon which legal liability can be established on the facts presented against either of the Defendants in this case.

In order to establish liability on either or both Defendants it is the Plaintiff's burden to establish that some act or omission of AGWAY and Kemins Industries was the legal cause of the destruction of the Plaintiff's barn.

The Plaintiff here presented no evidence in the case that the product which was produced by KEMINS INDUSTRIES and sold through AGWAY to the Plaintiffs, was either dangerous or defective at the time it was used, or that improved Hay Savor was a substantial factor in the cause of the fire which destroyed the Plaintiff's barn on July 8, 1971.

The Plaintiffs have also failed to established by competent evidence that the hot spots that testified in the various bales of hay were bales that were treated by Hay Savor and that the product was produced by KEMINS and marketed by them through AGWAY, was a substantial factor by way of causation and the fire that followed, other than the

one wagon load of bales that were tested in the field on the evening of June 15th, there is no evidence to establish that the moisture content of the remaining bales that were stored in the barn or in the mow of the center barn, during the period from June 13 through July 7th, and absent a proof of causal connection between the Plaintiffs damage and the use of the Defendants' product, there can be no recovery on the theories of breach of warranty or strict liability in the sale and use of the Defendant's product.

There remains a claim by the Plaintiff that on an alternative theory of recovery which is founded on negligence. Now as to this one, who negligently gives false information to another, is subject to liability for physical harm caused by action on the part of the person to whom such information is given if such person reasonably relies upon such information and his reliance on that information causes harm.

Now, an assurance of safety may constitute negligence when the person who makes the assurance can, or should foresee harm and here, there is some evidence that Mr. NELSON of KEMINS INDUSTRIES indicated to the Plaintiff to start baling the hay that was in the meadow on June 15th even though it appeared too green to the Plaintiff, adding, Mr. NELSON adding, that there was no need to worry if he used Hay Savor.

However, there is no evidence that the hay that was baled on June 15th developed hot spots or that was the source of the fire which occurred on July 8th.

Further, there is no evidence that the Plaintiff, Harold BIGELOW relied on the statement by Mr. NELSON in baling hay that had a high moisture content and there is no indi-

cation that the moisture content of any of the bales except those that were tested by NELSON on the evening of July 15th to the test of 22% of the 18 to 20,000 bales that were lost by fire, some 2500 were bales that were stored with unknown moisture content and were stored in that mow and, in the hay mow, before any communication occurred between the Plaintiff and NELSON.

If KEMINS INDUSTRIES negligently misrepresented that there was no need to worry about moisture in baling with Hay Savor, there is no evidence that such statement was relied upon by the Plaintiff and became the legal cause of the destruction of the barn.

It is for these reasons that the Court is called upon to act under Federal Rules of Civil Procedure, Number 50, and direct a verdict of No Liability as to each Defendant.

This makes it unnecessary for the Court to reach the question of whether or not the Plaintiff assumed the risk. Indeed, there is substantial evidence that the Plaintiff did assume the risk within the doctrine of our cases, however, the Court doesn't feel it necessary to predicate its ruling on that aspect of the case.

Again, I regret that after you have listened patiently to the evidence that the Court has to take the case from you by, of a ruling as a matter of law, but that is the way it appears to me and for that reason, there will be no need for the Jury to consider the facts of this case as would be true in the normal situation.

We appreciate your attention and careful thought that you have given to this case even though the case isn't and won't be submitted to you.

We expect to draw a jury in two other remaining cases later in the day and we will ask you to come back at 1:30 when we will proceed to trial of the other cases. So we will excuse you until 1:30. Thank you for your attention. (9:48 a. m.)

COMPLAINT

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

HAROLD BIGELOW and VIRGINIA BIGELOW,

vs.

AGWAY, INC. and KEMIN INDUSTRIES, INC.

Civil Action Docket No. 6536.

In a civil action Plaintiffs complain of the Defendants as follows:

1. HAROLD BIGELOW and VIRGINIA BIGELOW are residents and citizens of R. D. Swanton, Vermont. Defendant, AGWAY, INC. is a corporation organized and existing under the laws of the State of Delaware with its principal place of business located in Delaware, registered with the office of the Secretary of State for the State of Vermont to do business in the State of Vermont with its designated process agent being J. Boone Wilson, Esq., 192 College Street,

Burlington, Vermont. Defendant, KEMIN INDUSTRIES, INC. is a corporation organized and existing under the laws of the State of Iowa with its principal place of business located in Des Moines, Iowa. Jurisdiction is founded on diversity of citizenship of all the Plaintiffs and the Defendants and the amount in controversy exceeds TEN THOUSAND DOLLARS ($10,000.00).

2. HAROLD BIGELOW and VIRGINIA BIGELOW own a farm in R. D. 1 Swanton, Vermont, which they have operated as a dairy farm since 1967.

3. Defendant, KEMIN INDUSTRIES, INC., manufactures and distributes a liquid product known as Improved Hay Savor, and, during the spring of 1971 distributed its product to Defendant, AGWAY, INC., for further distribution and sale throughout the United States, including the State of Vermont.

4. That in the spring of 1971, representatives, servants and agents of Defendant, AGWAY, INC., acting in the scope of their employment, contacted HAROLD BIGELOW in an attempt to sell said HAROLD BIGELOW the so-called "Improved Hay Savor" and related equipment and supplied him with information both oral and written about the so-called "Improved Hay Savor."

5. As a result of the meeting between the agents and servants of AGWAY, INC., acting in the scope of their employment and HAROLD BIGELOW and the oral and written information supplied to HAROLD BIGELOW, HAROLD BIGELOW entered into an agreement with AGWAY, INC., to purchase certain equipment and supplies in connection with the use of the "Improved Hay Savor."

6. That at various times during the haying, agents and servants of AGWAY, INC., acting in the scope of their employment, were present and advised HAROLD BIGELOW how to install equipment, prepare the chemical products and condition the hay in the field for baling and storage all in connection with and using the "Improved Hay Savor" process.

7. That at all times material the said HAROLD BIGELOW followed the instructions and suggestions of the agents and servants of AGWAY, INC., acting in the scope of their employment and followed the oral and written information supplied to him in connection with and using said "Improved Hay Savor" process.

8. That the advice of the agents and servants of AGWAY, INC., acting in the scope of their employment, to HAROLD BIGELOW in connection with the "Improved Hay Savor" process were incorrect, inadequate, recklessly and negligently made.

9. That at all times material the Plaintiffs, HAROLD BIGELOW and VIRGINIA BIGELOW, in the purchase and operation of this system relied upon the information, oral and written, warranties and guarantees given by the agents and servants of AGWAY, INC., acting in the scope of their employment, and relied upon the quality and fitness of the products purchased as indicated to them by the agents and servants of AGWAY, INC., acting in the scope of their employment.

10. That at various times during the haying season and during the sales negotiations, agents and servants of AGWAY, INC., acting in the scope of their employment, warranted and guaranteed that the said process was safe, that

the manner in which the Plaintiff, HAROLD BIGELOW, was using said process was proper and safe and that no damage would occur to his premises by following their instructions.

11. That the products prepared by the Defendant, KEMIN INDUSTRIES, INC., and further distributed by AGWAY, INC., within the State of Vermont to said HAROLD BIGELOW were defective and unfit for the purposes for which they were sold.

12. That the products sold by AGWAY, INC., to said HAROLD BIGELOW were defective and not fit for the purposes for which they were sold.

13. That the said HAROLD BIGELOW in June of 1971 employed the products and equipment purchased from AGWAY, INC., followed the instructions and information provided by AGWAY, INC., and baled and stored quantities of hay treated with the Defendants' products in his barn situated on his farm.

14. That as a direct and proximate result of the use of the "Improved Hay Savor" and the incorrect, inadequate, reckless and negligent information given by the agents and servants of AGWAY, INC., acting in the scope of their employment and in contradiction of the warranties and guarantees made by the agents and servants of AGWAY, INC., acting in the scope of their employment, and because of the defective nature of the products manufactured by Defendant, KEMIN INDUSTRIES, INC., and sold to the Plaintiff, HAROLD BIGELOW, the main barn on the Bigelow farm caught fire in the late hours of 7 July 1971 or early hours of 8 July 1971 and burned to the ground.

15. That as a direct and proximate result of the acts and omissions of Defendant, AGWAY, INC., and Defendant, KEMIN INDUSTRIES, INC., as aforesaid, in addition to the Plaintiffs' loss of the main barn, the Plaintiffs lost crops, cattle and farm machinery in the resulting fire, suffered a loss in milk production from the surviving cattle, suffered additional costs in removal of the debris, suffered nervous anxiety, tension and other physiological injury and phychological injury to themselves.

WHEREFORE, as a result of all of the foregoing the Plaintiffs have been damaged in the amount of ONE HUNDRED TWENTY FIVE THOUSAND DOLLARS ($125,000.00) for the recovery of which, together with just costs, they bring this suit.

Dated at Middlebury, County of Addison, and State of Vermont, this 16th day of February A.D. 1972.

HAROLD BIGELOW and
VIRGINIA BIGELOW,

By /s/ PETER F. LANGROCK,
Their Attorney,

Langrock and Sperry,
Drawer 351,
Middlebury, Vermont 05753.

Appendix

WITNESSES

Bigelow, Harold Ernest
Munger, Donald Morton
Nelson, Thomas Eugene
Collingwood, Frank M.
Bessette, James Harold
Paquette, Rodney Howard
Bailey, Erden Wells
Bushee, James K.
Newton, Stuart Alney
Tessman, Andrew
Asplund, John Malcolm